In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 755

THE REPORTER PUBLISHING COMPANY, INC.,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 15–17) is reported in 18 T. C. 86. The opinion of the Court of Appeals (R. 89–93) is reported in 201 F. 2d 743.

JURISDICTION

The judgment of the Court of Appeals was entered on January 30, 1953. (R. 93.) The petition for a writ of certiorari was filed on April 28, 1953. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether taxpayer, a newspaper publisher and a member of the Associated Press, sustained a deductible loss in 1945 under Section 23 (f) of the Internal Revenue Code, in consequence of the alleged diminution in the market value of its Associated Press membership upon the rendering of the decision of this Court in *Associated Press* v. *United States,* 326 U. S. 1, which affirmed a district court decree enjoining certain practices by the Associated Press as in violation of the antitrust laws.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
> In computing net income there shall be allowed as deductions:
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> * * * * *
>
> (f) *Losses by Corporations.*—In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.
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> * * * * *
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> (26 U. S. C. [1946 ed.,] 23.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

> SEC. 29.23 (e)–1. *Losses by Individuals.*—* * *
>
> In general losses for which an amount may be deducted from gross income must be evidenced by closed and completed transactions,

fixed by identifiable events, bona fide and actually sustained during the taxable period for which allowed. Substance and not mere form will govern in determining deductible losses. Full consideration must be given to any salvage value and to any insurance or other compensation received in determining the amount of losses actually sustained. * * *

Sec. 29.23 (e)–3 [As amended by T. D. 5458, 1945 Cum. Bull. 45]. *Loss of Useful Value.*—When, through some change in business conditions, the usefulness in the business of some or all of the assets is suddenly terminated, so that the taxpayer discontinues the business or discards such assets permanently from use in such business, he may claim as a loss for the year in which he takes such action the difference between the basis (adjusted as provided in section 113 (b) and sections 29.113 (a) (14)–1 and 29.113 (b) (1)–1 to 29.113 (b) (3)–2, inclusive) and the salvage value of the property. This exception to the rule requiring a sale or other disposition of property in order to establish a loss requires proof of some unforeseen cause by reason of which the property has been prematurely discarded, as, for example, where an increase in the cost or change in the manufacture of any product makes it necessary to abandon such manufacture, to which special machinery is exclusively devoted, or where new legislation directly

or indirectly makes the continued profitable use of the property impossible. This exception does not extend to a case where the useful life of property terminates solely as a result of those gradual processes for which depreciation allowances are authorized. It does not apply to inventories. The exception applies to buildings only when they are permanently abandoned or permanently devoted to a radically different use, and to machinery only when its use as such is permanently abandoned. Any loss to be deductible under this exception must be fully explained in the return of income. * * *

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Sec. 29.23 (f)–1. *Losses by Corporations.*—* * * The provisions of sections 29.23 (e)–1 to 29.23 (e)–5, inclusive, and section 29.23 (i)–1 are in general applicable to corporations as well as individuals. * * *

STATEMENT

On March 1, 1940, the taxpayer, a Kansas corporation organized during that year, purchased for $150,000 the assets of the Independence Daily Reporter, a daily newspaper published in Independence, Kansas. Included in these assets was a membership in the Associated Press (hereinafter sometimes referred to as the "A. P."), to which the taxpayer assigned a value of $79,734.67. (R. 11–12.)

The Associated Press is a cooperative, nonprofit association of newspaper owners incorporated in New York in 1900. Its assets had a value of $2,000,000 in 1945. Its business consists of the collection, assembly, exchange, and distribution of news. (R. 12.) Prior to 1945, A. P.'s by-laws prohibited all A. P. members from selling or furnishing their spontaneous news to any agency or publisher other than A. P. (R. 12.) The by-laws also imposed various restrictions on the admission of new members, if they would be competitive with old members. (R. 13.) The net effect of these restrictions was to make it difficult, if not impossible, for nonmembers to get any of the news furnished by A. P. to its members. (R. 13.)

In 1943, in a suit brought by the United States under the antitrust laws, a Federal District Court of three judges, after finding that the by-laws of the Associated Press were "contracts in restraint of commerce" designed to stifle competition in the newspaper publishing field, entered a decree enjoining observance of the restrictions imposed by the by-laws on the admission of new members and prohibiting consideration of the applicant's ability to compete with old members in passing upon its application. *United States* v. *Associated Press,* 52 F. Supp. 362 (S. D. N. Y.). On June 18, 1945, this Court, on direct appeal, affirmed. 326 U. S. 1.

After the decision of this Court, although the taxpayer did not relinquish its membership in the Associated Press and, in fact, still continues to employ its services in the operation of its business,[1] it wrote down the value of the membership on its books from $79,734.67 to $50,000. (R. 16.) In its tax return for 1945 it deducted the difference between these two sums, $29,734.67, from its gross income as a loss sustained during the taxable year. (R. 61, 72.)

The deduction was disallowed by the Commissioner. (R. 10–11.) Before the Tax Court, the taxpayer claimed that its deductible loss was the entire value of its membership in the Associated Press, or $79,734.67, all of which had been rendered worthless by this Court's decision in the *Associated Press* case, *supra,* and not the amount originally claimed in its return. (R. 11, 15.) The Tax Court, in a decision reviewed by the full court, unanimously held that the taxpayer had not sustained a deductible loss in 1945 and accordingly approved the Commissioner's determination. (R. 15–17.) The Court of Appeals affirmed. (R. 89–93.)

[1] The taxpayer paid weekly assessments to A. P., totaling $3,622.27 during its fiscal year ended February 28, 1946, and about the same amount each year thereafter (R. 14). The Tax Court specifically found that the "[taxpayer's] membership in A. P. continued to have value in the operation of its business. Its monopolistic character prior to the Supreme Court decision was not the only thing which gave value to the contract." (R. 15).

ARGUMENT

1. The only question presented by this case is whether the taxpayer sustained a deductible loss in 1945 under Section 23 (f) of the Internal Revenue Code, *supra*, p. 2, in consequence of the alleged diminution in value of its membership in the Associated Press after this Court affirmed a decree which enjoined the observance of certain by-laws of that Association restricting the admission of new members. Both courts below have held that no deductible loss was sustained. In so holding, both courts reached the only conclusion compatible with the applicable statutory provisions and the Treasury Regulations.

Section 23 (f) of the Internal Revenue Code authorizes a deduction from the gross income of a corporation for "losses sustained during the taxable year". Under the applicable Treasury Regulations, which are of long standing, such losses to be deductible "must be evidenced by closed and completed transactions". Treasury Regulations 111, Sections 29.23 (e)–1 and 29.23 (f)–1, *supra* pp. 2–3, 4. The requirement of a "closed and completed transaction" ordinarily can be met only by a sale or other disposition of the asset. The only exception to this rule is in the case of complete worthlessness, in which event abandonment of the asset is sufficient. Treasury Regulations 111, Section 29.23 (e)–3, *supra*, pp. 3–4. In short only realized losses may be deducted. *Lucas* v *American Code Co.*, 280 U. S. 445, 449.

In this case, the taxpayer's membership in the Associated Press was not sold or otherwise disposed of in 1945, nor was it abandoned. On the contrary, taxpayer continues to avail itself of the advantages of such membership[2] and the Tax Court specifically found that such membership continues to be of value to it in the operation of its business.[3] (R. 15.) Clearly, then, there was no "closed and completed transaction" in 1945, in the absence of which no loss can be said to have been sustained within the meaning of the statute during that year. See *Pugh* v. *Commissioner,* 49 F. 2d 76 (C. A. 5), certiorari denied, 284 U. S. 642; *International Ed. Pub. Co.* v. *Commissioner,* 79 F. 2d 343 (C. A. 3);

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[2] Among the benefits of membership in the Associated Press which the taxpayer continues to enjoy are: the right to receive A. P. news services at cost (Charter and By-laws of the Associated Press, Ex. 7, Arts. VII and VIII), an interest in the property of A. P., worth approximately $2,000,000 in 1945 (*id.*, Art. II, Sec. 14; R. 12), and the right to sell its membership to successor publishers in connection with the sale of its business (*id.*, Art. II, Sec. 9).

[3] These facts completely distinguish this case from *Columbia Rivers Packers Assn.* v. *Commissioner*, decided June 8, 1942 (1942 P-H B. T. A. Memorandum Decisions, par. 42,338), cited by the taxpayer as being on all fours (Pet. 12). There, after passage of certain legislation prohibiting use of a particular kind of fishing equipment, the taxpayer discontinued fishing on leased property on which only such equipment could be used profitably and ceased to pay rent under its lease. On these facts, the Board of Tax Appeals held that the loss was sustained in the year fishing was discontinued under the lease and not in the year the lease expired.

5 Mertens, Law of Federal Income Taxation, Secs. 28.15, 28.17, 28.18.

The most that possibly occurred in 1945 was a mere diminution in the value of taxpayer's membership in the Associated Press. But, as this Court has said (*United States* v. *White Dental Co.*, 274 U. S. 398, 401):

> The statute obviously does not contemplate and the regulations (Art. 144) forbid the deduction of losses resulting from the mere fluctuation in value of property owned by the taxpayer.

In circumstances closely parallel to those present here the Court of Appeals for the Ninth Circuit has approved the denial of a deduction for a loss. *Consolidated Freight Lines* v. *Commissioner,* 101 F. 2d 813 (C. A. 9), certiorari denied, 308 U. S. 562. There, after a change in the applicable statutes took away a monopoly in the transportation for hire previously enjoyed by the holders of certain certificates of public convenience and necessity, a taxpayer claimed the right to deduct as a loss the cost to it of such a certificate purchased when the monopoly gave it great value. The claimed deduction was denied because of the taxpayer's continued operation under the certificate. As both courts below noted, this case is persuasive authority against the contention of the taxpayer.[4]

[4] The taxpayer, relying on one of the cumulative grounds given by the Court of Appeals for the Ninth Circuit in affirm-

2. There is no substance to petitioner's assertion that a conflict exists between the decision below and *Cohan* v. *Commissioner,* 39 F. 2d 540 (C. A. 2), and the cases which have followed it. The cases cited and discussed by petitioner (Pet. 7–10, 13) all represent various applications of the principle that a deduction to which the taxpayer is admittedly entitled should not be denied in toto because its amount cannot be established with absolute certainty.[5] This principle ob-

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ing the decision of the Board of Tax Appeals (now the Tax Court), attempts to distinguish the *Consolidated Freight Lines* case on the ground that "no question of monopoly was involved." (Pet. 10.) This represents an over-simplification of the reason given by the Court of Appeals for denying a deduction in addition to those set out in the opinion of the Board of Tax Appeals which it quotes with approval. The additional ground relied on by the appellate court was, not that there was no monopoly, but that the monopoly was one to which the taxpayer had no right since it was the creature of statute and "[n]o person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit." *Consolidated Freight Lines, supra,* p. 814. This reasoning applies with equal, or greater, force to the facts in this case. Clearly the taxpayer can have no vested interest in a monopoly declared to be illegal so as to entitle it to insist that it shall remain unchanged. The discussion on the point, however, was at best cumulative in that case, as is the argument in this one. The basic reason for denying the deduction in that case is the same as we urge here; *i. e.,* since the taxpayer continued to enjoy the rights and benefits conferred by the certificate there was no realized loss. Consequently, however the *Consolidated Freight Lines* case is viewed, it supports the decision below.

[5] The taxpayer cites *Cohan* v. *Commissioner, supra; Rugel* v. *Commissioner,* 127 F. 2d 393 (C. A. 8); *Abraham* v. *Commissioner,* 9 T. C. 222; and *Solt* v. *Commissioner,* 19 T. C.

viously applies only where the right to the deduction is conceded and only its amount is in dispute. It clearly has no application here, since in this case the deduction was denied, without regard to any uncertainty as to its amount, but because no closed and completed transaction had established the taxpayer's right to it.

3. Finally, allowance of the deduction claimed is not authorized by the tax statute. Such a deduction would frustrate the policies of the antitrust laws. It is clear that when a monopoly is "extinguished as noxious" under those laws, the monopolists "cannot demand compensation from the Government, or a partial compensation in the form of an abatement of taxes otherwise due." *Clarke* v. *Haberle Brewing Co.*, 280 U. S. 384, 386. Cf. *Commissioner* v. *Longhorn Portland Cem. Co.*, 148 F. 2d 276 (C. A. 5), certiorari denied, 326 U. S. 728; *Universal Atlas Cement Co.* v. *Commissioner*, 9 T. C. 971, affirmed, 171 F. 2d 294 (C. A. 2), certiorari denied, 336 U. S. 962.

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183. The first two involved entertainment expenses, found to be deductible, but whose amounts could not be established with exactitude. The other two involved deductions for loss of property abroad. The losses admittedly had been sustained and were deductible, but the taxpayer was unable to establish with any certainty his adjusted basis in the property at the time of the loss.

CONCLUSION

The decision below is correct, there is no conflict of decisions, and further review is not warranted. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1953.

U. S. GOVERNMENT PRINTING OFFICE: 1953